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November 12, 2009

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

Re: In the Matter of Level 3 Petition for Declaratory Ruling Regarding Access Charges by Certain Inserted CLECs for CMRS-Originated Toll-Free Calls (WC Docket No. 01-92 and CC Docket No. 96-262)

Dear Ms. Dortch:

On November 10, 2009, Comtel Telcom Assets LP d/b/a Excel Telecommunications ("Excel") (represented by its General Counsel Jonathan Dennis and Jim Lister of Birch Horton Bittner and Cherot), Level 3 Communications, LLC (represented by its Assistant Chief Legal Officer John Ryan and John Nakahata of Wiltshire & Grannis LLP) and DeltaCom, Inc. (represented by its Vice President, Regulatory Affairs and Senior Regulatory Attorney Tony Mastando) met with John Hunter and Lynne Engledow of the Pricing Policy Division of the Wireline Competition Bureau regarding the above-referenced petition filed by Level 3 (the "Level 3 Petition"). As November 11 was a Holiday, this ex parte disclosure letter is being timely submitted on the next business day, November 12, 2009.

In addition to discussing the issues raised by the Level 3 Petition, we discussed the individual disputes relating to the facts stated in the Petition that are pending between Hypercube and Level 3, Excel, and DeltaCom. We reviewed Level 3's litigation with Hypercube pending before the state public utility commissions in California, New York and Texas;[1] Excel's litigation with Hypercube pending before the U.S. District Court for the Northern District of Texas;[2] and DeltaCom's litigation with Hypercube pending before the state public utility commissions in Alabama, Florida, Georgia, and Tennessee.[3]

[1] See *Hypercube vs. Level 3 Communications*, California Public Utilities Commission, Docket No. C.09-5-009; *Hypercube v. Level 3 Communications*, New York Pub. Serv. Comm'n (Docket No. not yet assigned); and *Hypercube v. Level 3 Communications*, Texas Public Utilities Commission, Docket No. 37599.

[2] *Hypercube LLC and Hypercube Telecom LLC v. Comtel Telcom Assets LP d/b/a Excel Telecommunications*, Case No. 3:08-cv-02298-B (U.S. District Court, Northern District of Texas). We also disclosed but did not discuss the following informal complaint proceeding: Comtel Telcom Assets LP d/b/a Excel Telecommunications v. Hypercube Telecom LLC, FCC Informal Complaint File No. EB-09-MDIC-0028.

[3] *DeltaCom, Inc v. KMC Data, LLC and Hypercube Telecom, LLC*, Alabama Public Service Commission Docket No. 31176; *DeltaCom, Inc v. KMC Data, LLC and Hypercube Telecom, LLC*, Florida Public Service

(Footnote Continued)

We explained why Hypercube's scheme of inserting itself into the call path of wireless-originated 1-8YY calls hurts consumers. Hypercube's scheme involves the following conduct. Hypercube has persuaded wireless carriers, who by law cannot tariff access charges, to divert these calls from their normal calling path by routing them to Hypercube. To induce this diversion, Hypercube admits that it kicks back to the wireless carriers a portion of whatever Hypercube collects in alleged access charges from interexchange carriers ("IXCs"). Hypercube asserts that it is a wireline competitive local exchange carrier ("CLEC") entitled to bill LEC access charges and database dip charges. Hypercube's kickbacks encourage the wireless carriers to route calls though Hypercube and removes any incentive for the wireless carriers to route the calls in a more efficient manner (including through the incumbent local exchange carriers ("ILECs") with whom the wireless carriers were and are directly interconnected, or directly to the IXC where the wireless carrier and the IXC are directly interconnected). The kickbacks also remove any incentive for the wireless carriers to route calls through a competing provider (including the ILEC) offering better rates to IXCs than Hypercube. After receiving the calls from wireless carriers, Hypercube routes the calls to ILECs, who then route them to the IXC, and who also charge the IXC for the services they provide.

Hypercube's CLEC-insertion scheme provides absolutely no benefit to the IXCs but instead increases the amount billed to them. Hypercube's rates substantially exceed ILEC rates, and the ILECs also bill the IXCs. Hypercube's insertion greatly harms consumers by increasing the costs billed to IXCs without providing the IXCs any corresponding benefit whatsoever and without adding anything of value to the Nation's telecommunications network. To the extent Hypercube prevails, IXCs must pass on the increased costs to consumers in the form of higher rates. The inefficient routing resulting from Hypercube's insertion also harms the IXCs by increasing transport distances and multiple tandem usage, and by reducing direct-routed traffic.

Hypercube's conduct presents an industry-wide problem affecting multiple IXCs and their customers. Level 3, Excel, and DeltaCom have all had equally bad experiences with Hypercube and their individual attempts to achieve negotiated solutions with Hypercube have all failed.

We also explained why Hypercube's call-insertion scheme is a violation of the Commission's 2002 declaratory ruling order that confirmed that wireless carriers cannot tariff access charges.[4] Hypercube circumvents that order by billing access charges under an alleged tariff and funneling a portion of the collections to the wireless carriers, accomplishing indirectly what the wireless carriers cannot do directly. This circumvention is a thinly disguised violation of the Commission's 2002 order.

Commission Docket No. 090327-TP; *DeltaCom, Inc v. KMC Data, LLC and Hypercube Telecom, LLC*, Georgia Public Service Commission Docket No. 29917; *DeltaCom, Inc v. KMC Data, LLC and Hypercube Telecom, LLC*, Tennessee Regulatory Authority Docket No. 09-00077.

[4] *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC. Rcd. 13192, ¶¶ 8-9, 12 (2002)

Hypercube's scheme also turns back the clock on intercarrier compensation reform by enlarging the access charge system to include a category of carriers (wireless carriers) that the FCC excluded from the access charges system seven years ago. Expanding the access charge system to include wireless carriers (as Hypercube's scheme would do if permitted) will make it more difficult for the FCC to achieve meaningful intercarrier compensation reform. Adding additional categories of carriers to the access charge system would run contrary to the FCC's stated policy goal of reducing the role of access charges.

At the meeting, we provided to Mr. Hunter and Ms. Engledow the documents attached to this letter. One of the documents is a call-flow diagram which concerns Excel's experience with Hypercube. The diagram contrasts the call path before Hypercube became involved (wireless carrier to ILEC to IXC) with the call path after Hypercube became involved (wireless carrier to Hypercube to ILEC to IXC). In addition, Level 3 explained that its experience was slightly different than Excel's. Before Hypercube became involved, at least some wireless carriers routed calls directly to Level 3 without any intermediary parties being involved. After Hypercube became involved, these wireless carriers instead send wireless-originated 8YY calls to Hypercube who forwards them to ILECs who forwards them to Level 3, even though those same carriers still maintained direct interconnections with Level 3 for all other traffic. Notably, wireless carriers are not sending non-toll free calls through Hypercube.

The second document provided to Mr. Hunter and Ms. Engledow at the meeting and attached to this letter is a comparison of (a) Hypercube interstate rates as reflected on seven sample Hypercube invoices to Excel with (b) ILEC rates for equivalent interstate services. The chart shows that Hypercube interstate rates substantially exceed ILEC interstate rates for the functions provided. Accordingly, Hypercube's rates are not lawful, and cannot permissibly be tariffed at the FCC. 47 CFR 61.26(f). As part of this discussion, DeltaCom noted that Hypercube intrastate rates exceed ILEC intrastate rates by an even greater margin.

We noted that each Company was unsuccessful in its attempt to negotiate direct interconnection with Hypercube on reasonable terms in order to avoid the unnecessary routing through ILECs.

We explained that, in addition to the unnecessary routing through ILECs, Hypercube's network is highly inefficient as compared to ILEC networks. The wireless networks are directly interconnected with ILEC networks in many locations, so wireless carriers can and do efficiently route calls to IXCs through ILECs. By contrast, Hypercube has very few switches compared to the ILECs and calls going through it are sometimes routed very long distances. Further, Hypercube routes calls in ways that make it hard to understand and verify the originating locations of the calls. Moreover the relationship between Hypercube tandem switches and wireless local switches are not properly documented in the Local Exchange Routing Guide (LERG).

If Hypercube provides a service to anyone (which is highly doubtful), it would be a service to the wireless carrier. That would be service that, under cost-causer recovery principles, should be paid by its beneficiary, the wireless carrier. It should not be paid for by the IXC who makes no affirmative choice to use Hypercube and cannot prevent receipt of Hypercube's traffic.

We concluded by urging the Commission to act expeditiously on the Level 3 Petition in a manner that addressed the problem while it is still in its infancy. If the Commission does not act quickly, Hypercube's business model will be adopted widely, and multiple courts and agencies other than the Commission (there are eight proceedings already, and the list is growing) will make various decisions in the various Hypercube litigations, potentially resulting in fractured and inconsistent rulings across the country. Similar to the predicament facing the Commission when addressing traffic pumping, the failure of the Commission to act now will also result in other copycat insertion schemes that will exponentially increase the problems outlined above.

The Commission should grant Level 3's Petition for Declaratory Ruling and declare that Hypercube's call insertion kickback scheme is unlawful under existing law.[5] By declaring that Hypercube's scheme is unlawful under existing law, the Commission will discourage the dreaming up of new and varied schemes by arbitragers who hope to profit in the interim between when they dream up their various schemes and when they are shut down.

Sincerely,

/s/ James H. Lister	/s/ John T. Nakahata/JHL	/s/ Anthony Mastando/JHL
James H. Lister	John T. Nakahata	D. Anthony Mastando
Birch, Horton, Bittner and Cherot, P.C.	Wiltshire & Grannis, LLP	Vice President, Regulatory Affairs, Senior Regulatory Attorney, DeltaCom, Inc.
Counsel for Excel Telecommunications	*Counsel for Level 3*	*Counsel for DeltaCom*

Cc: John Hunter
Lynne Engledow
Jonathan Dennis (Excel)
John Ryan (Level 3)

[5] Level 3, Excel, and DeltaCom have not attempted to summarize in this letter all their respective defenses to Hypercube's claims, and reserve all rights.